TRANS RESOURCES CORP SDN BHD

v.

SANWELL CORP & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-22-42 OF 1998]
19 MAY 1999

ARBITRATION: *Stay of proceedings - Principles - Claim for debt due under a contract - Admission of debt by third party - Whether there was any dispute arising - Whether dispute within terms and scope of arbitration clause - Whether arbitration led to multiplicity of proceedings - Entering of unconditional appearance - Whether defendant had taken a step in the proceedings - Arbitration Act 1952, s. 6 - Rules of the High Court 1980, O. 12 rr. 6, 7*

The plaintiff and the first defendant had executed a contract whereby the plaintiff undertook to carry out certain earth works for the first defendant ('the earthwork contract'). Clause 41 of the earthworks contract provided for arbitration of disputes that might arise between the parties as regards the construction of the contract or 'any matter or thing of whatsoever nature arising under the contract'. Apart from the earthworks contract, there were also other agreements between the parties, including a lease agreement to which the second defendant was a party. None of these other agreements, however, contained any arbitration clause.

The plaintiff sued the first defendant for a sum allegedly owed by the first defendant to the plaintiff for earthworks performed under the earthworks contract. The first defendant, whilst disputing the claim, applied for a stay of proceedings pursuant to s. 6 of the Arbitration Act 1952. The plaintiff opposed the application and retorted that the disputes ought not to be referred to arbitration as: (i) there was no dispute arising as the debt due was acknowledged by the first defendant *vide* exh SMZ-7, and by the first defendant's sister company ('Agarta') *vide* exh SMZ-11 (ii) the disputed relief sought did not come within the ambit of the arbitration clause (iii) there was multiplicity of proceedings which may result in inconsistent findings of fact and decisions by different tribunals since the second defendant had no recourse to the same arbitration proceedings; and (iv) by entering an unconditional appearance, the first defendant had taken 'a step in the proceedings'.

Held:

[1] Exhibit SMZ-7, the architect's certificate, was merely an evaluation of the work done by the plaintiff. Nowhere was it stated therein that the first defendant was liable to the plaintiff for the amount certified. As for exh SMZ-11, the letter from Agarta constituting an admission of the debt by the first defendant to the plaintiff, it was untenable in law as proof of the first defendant's liability to the plaintiff. Agarta was a separate legal entity from the first defendant and was not a party to the earthworks contract, and could not therefore make an admission on behalf of the first defendant.

[2] Clause 41, framed as it were in wide and general terms, did envisage the nature of the two disputes raised by the first defendant. In any case, the dispute as to payment, which was an obligation arising under the earthworks contract, was clearly a 'matter or thing arising' thereunder and was thus caught by cl. 41.

[3] The earthworks contract and the other agreements herein were very closely related and linked to one another. In the circumstances, and as was indeed acknowledged by the second defendant, the terms of each of the agreements would have been within the knowledge and contemplation of all the parties at the time of their execution. Therefore, since the earthworks contract was the only agreement that had expressly provided for an arbitration clause, there was a strong inference that the parties intended only to arbitration disputes arising under the earthworks contract, and not those that arose under the other agreements. The plaintiff and the second defendant, by their default of not resorting to the procedural choice of seeking arbitration, had given rise to the issue of multiplicity of proceedings. That being so, they could not now be seen to be taking advantage of their own default.

[4] The entering of an unconditional appearance could not amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiffs filing of the civil suit did not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it had not been the first defendant's contention that the court has no jurisdiction to deal with the dispute.

[Order in terms of application.]

Case(s) referred to:

Alagappa Chettiar v. Palanivelpillai & Ors [1967] 1 MLJ 208 ***(refd)***
Bulk Oil (Zug) AG v. Trans-Asiatic Oil Ltd SA [1973] 1 Lloyd's LR 129 ***(refd)***
Cheah Wai Poh v. Chin Brothers & Co Ltd [1958] 24 MLJ 215 ***(refd)***
Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 ***(refd)***
Fakes v. Taylor Woodrow Ltd [1973] 1 All ER 670 ***(refd)***
Hashim Majid v. Param Cumarasamy & Ors [1993] 2 MLJ 20 ***(refd)***
Ismail Abd Halid v. National Union of Newspapers Workers [1993] 3 MLJ 541 ***(refd)***
KSM Insuran Bhd v. Ong Ah Ba & Anor [1986] 1 MLJ 237 ***(refd)***
Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 ***(refd)***
Malayan Banking Berhad & Anor v. Swasta Jaya Sdn Bhd [1990] 1 CLJ 1096 ***(refd)***
San Kong Letrik Sdn Bhd v. Lembaga Letrik Tanah Negara Tanah Melayu & Anor [1992] 2 CLJ 190 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***
Sheldon v. Brown Bayley's Steelworks Ltd & Anor [1953] 2 All ER 894 ***(refd)***
Smith v. Pearl Assurance Co Ltd [1939] 1 All ER 95 ***(refd)***
Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena) [1995] 1 CLJ 231 ***(refd)***
Taunton Collins v. Cromie & Anor [1964] 2 All ER 332 ***(refd)***
The "Avro International" [1988] 1 MLJ 147 ***(refd)***
The Avro Venture [1987] 1 MLJ 16 ***(refd)***
The Jade [1976] 1 All ER 441 ***(refd)***
The Pine Hill [1958] 2 Lloyd's LR 146 ***(refd)***
Usahabina v. Anuar Yayha [1998] 2 CLJ Supp 131 ***(not foll)***

Legislation referred to:

Arbitration Act 1952, s. 6
Rules of the High Court 1980, O. 12 rr. 6, 7

Arbitration Act 1950 [UK], s. 4(1)

For the plaintiff - CC Choo (SK Lit with him); M/s CC Choo & Co
For the 1st defendant - HL Ooi (HK Yeoh with him); M/s Cheang & Ariff
For the 2nd defendant - Logan B Sabapathy (TJ Chin with him); M/s Logan Sabapathy & Co

Reported by WA Sharif

a

JUDGMENT

RK Nathan J:

Facts

b By an earthworks contract dated 30 October 1996 between the 1st defendant and the plaintiff (the Earthworks Contract) the 1st defendant engaged the plaintiff to carry out earthworks upon the terms and conditions contained therein. Clause 41 of the Earthworks Contract contains a provision for the arbitration of disputes and/or differences arising between the parties to the contract. The said clause reads as follows:

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> ... If the parties do not reach such amicable solution within 14 Days from the request sent by any party to the other party to start the above negotiations, then the disputes shall be finally settled by arbitration, pursuant to Section 41 below.
>
> d **Arbitration**
>
> (a) If any dispute or difference shall arise between the Client and the Earthworks Contractor, either during the progress or after completion of the Works, or after the termination of the Earthworks Contractor's employment, or breach of this Contract, as to:
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> e (i) the construction of this Contract, or
>
> (ii) any matter or thing of whatsoever nature arising under this Contract, or then such dispute or difference shall be referred to the Regional Centre for Arbitration at Kuala Lumpur (the "Arbitrator") for a
>
> f decision ...

Plaintiff's Claim

By way of this suit the plaintiff claims against the 1st defendant the sum of RM17,459,445.69 allegedly owed by the 1st defendant to the plaintiff for
g earthworks performed under the said Earthworks Contract.

The 1st Defendant's Case

The 1st defendant disputes the plaintiff's claim on two grounds, namely:

h (i) That on a true and proper construction of the Earthworks Contract and in all the circumstances of the case, the plaintiff is not entitled to seek payment of the sum of RM15,500,000 from the 1st defendant upon termination of the Earthworks Contract.

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(ii) That on a true and proper construction of the Earthworks Contract and in the light of all the facts and circumstances of the case, the 1st defendant is also not liable to the plaintiff for the balance of RM1,959,445.69 for want of approval by the 1st defendant for the works purportedly done amounting to this value.

The Application

This is the 1st defendant's application for a stay of these proceedings pursuant to s. 6 of the Arbitration Act 1952 (the Act). The said section reads as follows:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Findings Of The Court

A study of s. 6 of the Act shows that there are four requirements to be satisfied before a stay could be granted. The said four requirements are:

(a) That legal proceedings must have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration.

(b) That no other steps in the proceedings be taken before the making of the application for stay.

(c) That there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties.

(d) That the applicant was at the time of the application, and remains ready and willing to do all things necessary for the proper conduct of the arbitration.

Whilst requirements (a), (b) and (d) fall within the duty of the party applying for the stay to satisfy the Court, it would seem that based on the decision of the court in *Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459, the onus is upon the party opposing the application for a stay to show why the matter ought not to be referred to arbitration. This is what his Lordship Peh Swee Chin J (as he then was) said at p. 460:

It would be necessary to restate a few relevant basic principles of stay of action on ground of arbitration. Not only should there by a valid arbitration agreement, the applicant should apply for a stay before taking any step in the proceedings after appearance, and that applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. Please see section 6 of the Arbitration Act 1952. These few principles require elaboration later in regard to the negative requirement of not taking any other step in the proceedings after appearance.

In the face of such an application from a defendant, the plaintiff will have the onus of showing that the matter ought not to be referred to arbitration. Please see the old case of *Drouth v. The Ship, "Paul Donmer"* ([1934] MLJ 72), and if the plaintiff fails to discharge the onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the *prima facie* duty of the court to act upon such an arbitration agreement: per Lord Selbourne L.C. in *Willesford v. Watson* ([1873] 8 Ch. App. 473, 480)

Having read the affidavits in respect of this application I am satisfied that cl. 41 of the Earthworks Contract which clause clearly is framed in wide and general terms envisages the nature of the two disputes raised by the 1st defendant.

The plaintiff raises 4 issues.

(1) There Is No Dispute as The 1st Defendant Has Acknowledged That There Is a Debt Due And Owing By The 1st Defendant To The Plaintiff

In support of this issue the plaintiff referred me to encl. 16 (affidavit in support of the plaintiff's case) and to exh. SMZ-7 which is the amount certified by the architect under the architect's certificate dated 7 August 1997. There was also reference made to exh. SMZ-11 which amount was acknowledged as due by Agarta Universe Sdn Bhd (Agarta). It was pointed out that the 1st defendant and Agarta belonged to the same group of companies in that the former was appointed by the latter to enter into the Earthworks Contract. I have studied both exhibits. Exhibit SMZ-7, the architect's certificate dated 7 August 1997, is merely an evaluation of the work done by the plaintiff on the said site. No where is it stated in the said letter that the 1st defendant is liable to the plaintiff for the amount certified. In any case, pursuant to cl. 31.2 of the Earthworks Contract, in the event of termination of the contract by the plaintiff, the plaintiff is to require the 2nd defendant and not the 1st defendant to pay the amount so certified.

As for the next exhibit, namely SMZ-11, which purportedly acknowledges the debt due from the 1st defendant to the plaintiff, it is my judgment that the letter from Agarta constituting an admission of the debt by the 1st defendant is untenable in law as proof of the 1st defendant's liability to the plaintiff

since clearly Agarta is a separate legal entity from the 1st defendant and is not even a party to the Earthworks Contract. Surely a third party cannot make an admission on behalf of the 1st defendant. In any case, the affidavits filed by and on behalf of the 1st defendant in support of this application deny and dispute the allegation that the 1st defendant is liable for any sums to the plaintiff. The plaintiff relied on *Elf Petroleum S.E. Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 and on *KSM Insuran Bhd v. Ong Ah Ba & Anor* [1986] 1 MLJ 237 to support its argument that where the amount is admitted reference to arbitration does not arise. I am of the view that the two cases cited do not assist the plaintiff's case. In the Elf Petroleum, the learned judge based his decision on his finding that there was in fact an admission of debt and that the debt was not disputed in any of the affidavits. Similarly in *KSM Insuran Bhd* the court found the debt to be undisputed as the defendant therein had not contended that the amount claimed was not owing.

(2) That The Disputed Relief Sought Is Not Within The Terms And Scope Of The Arbitration Clause

It is the plaintiff's case that as the dispute involves the construction of the Letter of Guarantee, which does not itself contain the arbitration clause, therefore the dispute is outside the scope of cl. 41 of the Earthworks Contract. On the other hand, the 1st defendant submits that the dispute herein is clearly within the scope of the said clause. It is a fact that cl. 41 covers "any dispute or difference ... between the Client and the Earthworks Contractor ... as to:

(i) the construction of this Contract, or

(ii) any matter or thing of whatsoever nature arising under this Contract ...

The 1st defendant argues that its case falls within limb (1) of cl. 41 as it involves *inter alia* the construction of cls. 31.2, 1.1.57, 2.2, and 2.5 of the Earthworks Contract. It is relevant to reproduce the said clauses.

Clause 31.2:

... In the event of termination under this Section 31, the Earthworks Contractor is entitled to stop the carrying out of the Earthworks Works and request UML to pay the amount of money due for the performance of the Earthworks Works until the date of termination, ...

Clause 1.1.57:

'Letter of Guarantee' means the letter of guarantee, attached as Schedule 2 hereto, stating that UML represents, warrants and undertakes to pay the amount of MR15,500,000 (fifteen million five hundred thousand) as the Guaranteed Sum in lieu of the Client in case of termination.

Clause 2.2:

... the parties agree and the Earthworks Contractor acknowledges that the Earthworks Contract Sum is comprised of:

a) the Guaranteed Sum, the payment of which is guaranteed and secured by the Letter of Guarantee; and

b) the Balance of Earthworks Contract Sum which will be paid only in case the Client grants its approval pursuant to section 2.5 hereof.

Clause 2.5:

It is agreed by the parties that the Earthworks Contractor shall request to the Client approval for the performance of any and all works which cause the payment of any amount of money exceeding the Guaranteed Sum.

(a) If the Client, upon request of the Earthworks Contractor, grants its approval in connection with the performance of such portion of the Earthworks Works, the value of which is in excess of the Guaranteed Sum, it shall secure the payment of the Balance of the Earthworks Contract Sum to the Earthworks Contractor.

(b) If the Client refuses to give such approval and/or give such guarantee in a form acceptable to the Earthworks Contractor, the Earthworks Contractor shall (i) stop the performance of the Earthworks Works, and (ii) this Earthworks Agreement shall be terminated.

Considering the 1st defendant's contention that it is not liable for the balance sum for want of approval, it is clear to me from reading the above clauses that the 1st defendant's approval is indeed required for work done beyond the value of the guaranteed sum, that is, the balance sum or any part thereof. I find as a fact that the plaintiff has not stated in any of its affidavits let alone in its submission, that such an approval was ever obtained.

In any case it is also my judgment that the dispute as to payment, which is an obligation arising under the Earthworks Contract, is a "matter or thing arising" thereunder.

(3) Multiplicity of proceedings

The plaintiff and the 2nd defendant argued that if this application is allowed then there would be multiplicity of proceedings which may result in inconsistent findings of fact and decisions by different tribunals because the 2nd defendant would have no recourse to the same arbitration proceedings. I cannot accept this argument. It is apparent that the intention of the parties was not to submit all the issues arising, save for disputes under the Earthworks Contract, to arbitration. I am of the view that this court ought to give effect

to what was expressly agreed to between the parties and refer the dispute covered by cl. 41 of the Earthworks Contract to arbitration. The case of *Bulk Oil (Zug) A.G. v. Trans-Asiatic Oil Ltd SA* [1973] 1 Lloyd's LR 129 has similar connotations. This case involved two closely linked agreements, namely, a contract for carriage by sea which contained an arbitration clause and a charter party contract which did not contain such a clause. Both agreements were "linked in conception, execution and breach". The plaintiff in this case sought to obtain a stay of the defendant's counterclaim pending reference to arbitration pursuant to s. 4(1) of the English Arbitration Act 1950 which is in *pari materia* with our s. 6 of the Act. In Bulk Oil despite the issue of multiplicity of proceedings raised by the defendant Kerr J held that the express procedural choice of the parties ought to be enforced and granted a stay in respect of the dispute governed by the arbitration clause. He said at p. 138:

> The fact that, despite the close relationship between these agreements, the parties have deliberately made them subject to different jurisdiction clauses is a point which must weigh heavily in the balance against the defendants, who now seek to invoke this close relationship between the agreements as a ground for obliterating this difference to which they have agreed.

Coming to the case before me, it is obvious from an examination of the Lease Agreement, the Joint Venture Agreement, the Earthworks Contract, the Letter of Guarantee, that these agreements were and are all very closely related or linked to one another. In any case, the 2nd defendant has indeed acknowledged this as a fact.

In the circumstances, it is my judgment that the terms of each of the agreements would have been within the knowledge and/or contemplation of all the parties at the time of their execution. I therefore find that because only the Earthworks Contract has expressly provided for an arbitration clause to the exclusion of the other aforesaid agreements, a strong inference may be made that the intention of the parties was to refer to an arbitrator only disputes arising under the Earthworks Contract, and not disputes arising under the other agreements.

I am therefore bound to give recognisance to the freedom of the parties to contract in whatsoever manner by giving effect to the clear intention of the parties as contained in the Earthworks Contract. Therefore since the various parties to the agreements including the plaintiff and the 2nd defendant, intended to exclude any recourse to arbitration in the agreements, with the exception of the Earthworks Contract, it is only just and fair that the parties be kept to the express terms of their respective agreements and that this court ought to exercise its discretion by enforcing the arbitration clause in cl. 41 of the Earthworks Contract.

It is not in dispute that the 2nd defendant is a party to the Lease Agreement and the Letter of Guarantee and possesses full knowledge of the Joint Venture Agreement through its subsidiary, UM Leisure Sdn Bhd. The plaintiff is a party to both the Earthworks Contract and the Letter of Guarantee. As such, the 2nd defendant and the plaintiff could have expressly provided for arbitration in the event of a dispute in respect of the other agreements. Since they had not done so (except for the Earthworks Contract), I find that it is the plaintiff and the 2nd defendant who, through their own default by not resorting to the procedural choice of seeking arbitration, have given rise to the issue of multiplicity of proceedings. The plaintiff and the 2nd defendant cannot now be seen to take advantage of their own default. One of the cases relied on by the plaintiff is *Alagappa Chettiar v. Palanivelpillai & Ors* [1967] 1 MLJ 208. In that case the learned judge held that the party opposing the stay application had discharged the onus of satisfying the Court that there were good grounds for the case to proceed to court as some of the issues in dispute were within the exclusive jurisdiction of the Rent Assessment Board, which necessarily meant that an arbitrator would have no jurisdiction to deal with the same. In the case before me, neither the plaintiff nor the 2nd defendant has contended that the dispute herein is outside the jurisdiction of the arbitrator. It is my judgment that if the parties had expressly provided for arbitration to be incorporated in all the agreements, which they could have easily done, then an arbitrator could have dealt with all the issues arising herein without any question as to jurisdiction.

(4) Step In The Proceedings By Filing An Unconditional Appearance

The plaintiff submits that by entering an unconditional appearance the 1st defendant has taken a step in the proceedings. The plaintiff relied heavily upon the decision of *Usahabina v. Anuar b Yayha* [1998] 2 AMR 1370 where Augustine Paul JC (as he then was) held that the entry of an unconditional appearance did amount to a step in the proceedings, thus barring an application for stay. His Lordship arrived at this decision based on two primary grounds, namely:

(i) The absence of the words "after appearance" in the phrase "before taking any other steps in the proceedings" in s. 6. This is in contradistinction with the English equivalent to s. 6 which provision reads "... any party to those legal proceedings may at any time after appearance, and before delivering any pleading or taking any other steps in the proceedings ...

(ii) That the entry of an unconditional appearance was submission to the jurisdiction of the court and hence a waiver of the defendant's right to resort to arbitration.

With very great respect to my learned brother, I decline to adopt his reasoning. The Order relating to conditional appearance is governed by O. 12 rr. 6 and 7 of the Rules of the High Court 1980 (the RHC) which reads as follows:

> 6 Conditional appearance
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> (1) A defendant to an action may with the leave of the Court enter a conditional appearance in Form 16 in the action.
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> (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 7 and the Court makes an order thereunder.
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> 7. Application to set aside writ, etc
>
> (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ on him or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ on him out of the jurisdiction.
>
> (2) An application under this rule must be made by summons.

The entry of a conditional appearance pursuant to O. 12 rr. 6 and 7 of the RHC is in my view only available to cases where:

(a) the defendant complains of an irregularity or defect in the originating process or service of the originating process upon him; and/or

(b) the defendant alleges that the court is without jurisdiction to deal with the dispute.

Augustine Paul JC (as he then was) followed the Singapore Court of Appeal's decision in *The "Avro International"* [1988] 1 MLJ 147 CA which upheld the trial judge's decision (see *The Avro Venture* [1987] 1 MLJ 16). In that case the court held that a defendant who wishes to set aside the writ or its service for non-appearance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance and since in that case the appellant had entered an unconditional appearance that was fatal to its right to object to jurisdiction.

In my view neither of the two criteria relied upon by Augustine Paul JC are applicable to a s. 6 application since the court's jurisdiction can never be contractually ousted by parties to a contract. This reasoning is solidly

propounded by Gopal Sri Ram JCA in the Federal Court decision in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 where his Lordship said at p. 278/279 as follows:

> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants. See *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Co Ltd, Hongkong* [1995] 1 MLJ 322.

In *Cheah Wai Poh v. Chin Brothers & Co Ltd* [1958] 24 MLJ 215 Syed Sheh Barakbah J (as he then was) held that the entry of unconditional appearance is not "taking any other steps in the proceedings" within the meaning of s. 5(1) of the Arbitration Ordinance. "Steps in the proceedings", in the technical sense, means an application to the court such as taking out a Summons; the act must display intention to proceed with the Suit and to give up the right to have the matter disposed of by arbitration. Again in *Hashim bin Majid v. Param Cumarasamy & Ors* [1993] 2 MLJ 20 Anuar J (as he then was) said at p. 24 as follows:

> The learned counsel for the plaintiff submitted that the defendants have entered an unconditional appearance and therefore no longer have a right to apply to the court to stay the proceedings.
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> The learned counsel argued that by entering an appearance, the defendants have taken a step in the proceedings. Under s. 6 of the Arbitration Act 1952, the defendants may only apply to the court to stay the proceedings 'before taking any steps in the proceedings'.
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> The pertinent question here is what is a 'step'. In *Ives & Barker v. Willans* [1984] 2 Ch 478 Lindley LJ said at p. 484:
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> > The authorities shew that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.
>
> It is clear to me that entering an appearance is not or cannot be regarded as a step in the proceedings.

> In my view the defendants may apply to the court for stay of proceedings under s. 6 of the Arbitration Act 1952.

In Usahabina my learned brother having considered the decisions in Cheah Wai Poh and Hashim b. Majid declined to follow the same.

In the circumstances, based on the rationale in *Tan Kok Cheng (supra)* there can be no question of the parties consensually ousting the court's jurisdiction to hear and determine disputes between them.

Additionally the fact that an affidavit was filed in response to the plaintiff's application for summary judgment also presents no bar as the said affidavit was filed subject to a reservation of the right to arbitrate. On this issue it is pertinent to refer to the case of *Ismail b. Abd. Halid v. National Union of Newspapers Workers* [1993] 3 MLJ 541 where Mahadev Shankar J (as he then was) said at p. 551:

> Counsel for the Union sought to submit that no affidavit was filed to controvert the fact stated by the plaintiffs because that would be tantamount to taking 'a step in the action' which would have defeated the application for a stay.
>
> With respect, I regret I am unable to agree. The onus cast by s. 6 of the Arbitration Act 1952 to show sufficient reason why the matter had to be referred to arbitration was upon the Union. Where the circumstances were such that it was not enough to make a bold reference to the existence of the arbitration clause, it was for the party insisting on the arbitration to show why that should be so. Arbitration is but a means to an end. Whether the parties should be compelled to take that route to resolve the dispute or whether it should be done by the court is a problem which may require consideration of a variety of other facts. Provided the party applying for a stay makes it clear before he joins issue on the merits, that he is doing so without prejudice to and subject to his insistence on the arbitration clause, that should not amount to a step in the action.

In *Usahabina,* the court considered the case of *Sheldon v. Brown Bayley's Steelworks Ltd & Anor* [1953] 2 All ER 894 which involved the service of a writ more than 12 months after it was issued, that is, an irregular writ. It was held there that entering an unconditional appearance was a waiver of such irregularity. In the present case, there is no question of an irregularity by the plaintiff's filing of the action herein which may be waived. The 1st defendant merely asked the court to exercise its discretion under s. 6 of the Act which statutory provision provides recourse to parties to enforce express arbitration agreements. The 1st defendant has at all material times conceded that this court has full jurisdiction to deal with and decide on all the issues arising herein and has at no time challenged the jurisdiction of the court. Another decision followed by the learned judge in Usahabina is the case of *Malayan Banking*

Berhad & Anor v. Swasta Jaya Sdn Bhd [1990] 2 MLJ 12. In that case due to a mistake by the court registry the appearance was not entered into the court file and judgment in default was thereby entered. The judgment in default was then set aside on grounds of irregularity. The case only emphasises the significance and the importance of filing an appearance and does not in any way support the contention that filing an unconditional appearance is tantamount to taking steps in the proceedings. Finally I refer to the then Supreme Court decision in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 SC where the court held that the filing of affidavits seeking discharge of the *ex parte* interlocutory injunction and the taking of the preliminary objection challenging the jurisdiction of the court did not indicate an election to abandon the defendant's right to a stay and did not constitute the taking of a step in the proceedings, notwithstanding the fact that in Seloga Jaya the defendant had indeed entered a conditional appearance and applied for a stay.

To my mind, the entering of an unconditional appearance cannot amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the civil suit herein does not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it has not been the 1st defendant's contention that the court has no jurisdiction to deal with the dispute.

(5) Financial Hardship, Justice And Convenience

On this issue, the plaintiff contends that its claim is for a large sum and that no payment has been made by the 1st defendant to the plaintiff for a considerable period of time. It also raises the issue of substantial arbitration fees and the fact that such fees would have to be paid up-front.

I find that these arguments do not constitute good grounds for refusing a stay. The time and mode of payment for the earthworks and the provisions relating to arbitration in the event of a dispute are all governed by express terms based on the Earthworks Contract. These terms were agreed upon between the plaintiff and the 1st defendant. The plaintiff cannot now be heard to complain of injustice and ask this Court to intervene and revoke such clear and unequivocal terms in the Earthworks Contract willingly entered into by the parties, just because some terms have become inconvenient or disadvantageous to the plaintiff. Excessive costs of arbitration ought to have been in the plaintiff's mind even when it had entered into the Earthworks Contract. Courts will be loathe to disrupt agreements and contracts willing entered into by parties where the terms and conditions are clear, expressive and unequivocal. There is in any case no evidence before me that litigation in court would be any cheaper. The plaintiff also raised the issue that the 1st defendant has

ceased business operations in Malaysia. Other than this bare statement nothing more has been made of it by the plaintiff. Relying upon the case of *Fakes v. Taylor Woodrow Ltd* [1973] 1 All ER 670, the plaintiff urged this court to consider the financial hardship faced by the plaintiff in order to proceed to arbitration. I have read Fakes case. There the court started by citing the general principle as laid down by the Court of Appeal in *Smith v. Pearl Assurance Co Ltd* [1939] 1 All ER 95 where Sir Gordon Willmer said at p. 677 in Fakes case as follows:

> ... I think we must start from the principles laid down by this Court in *Smith v. Pearl Assurance Co Ltd.* I take that decision to be a decision of principle as to what may and what may not properly be taken into consideration by a court exercising its discretion whether or not to stay proceedings where there is an arbitration clause. It was held in that case that the mere fact of the plaintiff's poverty, which would have rendered it financially impossible for him to go to arbitration, was not per se a sufficient ground on which the court could refuse to order a stay.

It is clear that a departure from such established general principle in the Fakes case was restricted only to the limited circumstances therein, where the plaintiff was an insolvent individual on legal aid. Lord Denning MR held that as legal aid would not be available for arbitration proceedings referring the case to arbitration would be tantamount to depriving the plaintiff to a claim. In the case before me, there is no question of legal aid. The plaintiff has adduced no evidence of insolvency or impecuniosity. This argument is therefore rejected.

Ready And Willing

The 1st defendant has averred that it is willing to do all things necessary for the purpose of the arbitration. In *Lee Brothers Construction Co (supra)* Peh Swee Chin J said as follows at p. 461:

> It was fourthly submitted that a bald assertion about willingness to do everything necessary for the proper conduct of the arbitration was not sufficient.
>
> Jessel M.R. in *Piercy v. Young* ([1880] 14 Ch. D. 200) made an observation, though obiter, that the lower court should have required an affidavit to be produced on willingness and readiness to refer to arbitration. In my view, an affidavit ought to be ordinarily sufficient as to such willingness or readiness in the absence of some evidence of unwillingness on the part of the defendant to refer to such tribunal of its choice.

In the case before me no other evidence has been adduced to show that the 1st defendant is unwilling to arbitrate.

The 2nd defendant raises two issues:

(1) Multiplicity Of Proceedings

In effect the 2nd defendant's arguments are almost similar to those raised by the plaintiff. The plaintiff relied on *The Pine Hill* [1958] 2 Lloyd's LR 146 and *Taunton Collins v. Cromie & Anor* [1964] 2 All ER 332 to support its argument on multiplicity of proceedings. However these two cases were considered by Kerr J in Bulk Oil and which I had adverted to earlier. In distinguishing The Pine Hill and Taunton Collins with the facts in Bulk Oil Kerr J said at p. 136:

> ... in both these cases the multiplicity of proceedings covering the same issues did not arise solely from a choice made by the party wishing the whole dispute to be dealt with by litigation. In the first case the difficulty was due to the party which was applying for the stay, i.e., the charterers. In the second case the difficulty was due to a defence raised by a party which was not concerned with any arbitration clause, i.e., the architect seeking to blame the contractors. In neither case was the difficulty in which the plaintiff found himself due to his own procedural choice.

The 2nd defendant also referred me to *The Jade* [1976] 1 All ER 441 and *San Kong Letrik Sdn Bhd v. Lembaga Letrik Tanah Negara Tanah Melayu & Anor* [1992] 2 CLJ 190. Again these cases may be well distinguished. The multiplicity of proceedings in these cases arose from claims in tort and not as a result of a conscious choice made by the parties. These cases involved contractual claims containing arbitration clauses, and claims in tort. The case before me involves purely contractual relations under which the parties could have provided for the incorporation of the arbitration clause, but chose not to do so, save and except in the case of the Earthworks Contract.

(2) To Consider The Letter Of Guarantee

I have sufficiently canvassed this issue in dealing with the case as against the 1st defendant. I need not repeat my views. The same would apply in respect of the 2nd defendant.

I therefore grant an order in terms of the 1st defendant's application with costs.